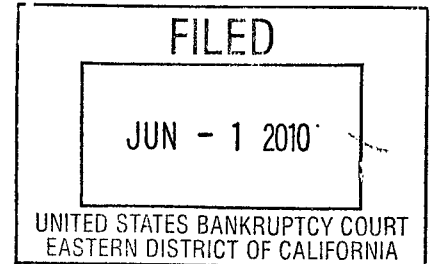


12



**POSTED ON WEBSITE
NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

9	In re:)	Case No. 09-29162-D-11
10	SK FOODS, L.P.,)	Docket Control No. MSS-4
11	Debtor.)	Date: May 26, 2010
12)	Time: 10:00 a.m.
13)	Dept: D

14 **This memorandum decision is not approved for publication and may**
 15 **not be cited except when relevant under the doctrine of law of**
 16 **the case or the rules of claim preclusion or issue preclusion.**

MEMORANDUM DECISION

17 On April 28, 2010, the defendants in six adversary
 18 proceedings filed by the chapter 11 trustee in this case, Bradley
 19 Sharp, filed a motion to stay the adversary proceedings pending
 20 completion of the criminal action against Scott Salyer now
 21 pending in the district court for this district. Companion
 22 motions were filed in each of the adversary proceedings -- Adv.
 23 Nos. 09-2692, 10-2014, 10-2015, 10-2016, 10-2017, and 09-2543;
 24 the court's rulings on those motions will mirror this decision.
 25 For the reasons set forth below, the court will deny the motion.

I. THE MOVING PARTIES' CONTENTIONS

27 The moving parties contend that prosecution of the adversary
 28 proceedings while the criminal case is pending would jeopardize

1 Salyer's Fifth Amendment right against self-incrimination, that
2 the moving parties, as defendants in the adversary proceedings,
3 would be deprived of evidence that might be supplied by Salyer
4 and others who are "effectively unavailable as witnesses because
5 of their status as defendants" in related criminal cases or as
6 cooperating government witnesses in the case against Salyer, and
7 that forcing the moving parties to defend themselves without that
8 evidence would deprive them of due process. The moving parties
9 make short shrift of countervailing considerations, which are,
10 however, analyzed in the oppositions filed by the trustee and the
11 unsecured creditors' committee.

12 II. ANALYSIS

13 "The Constitution does not require a stay of civil
14 proceedings pending the outcome of criminal proceedings."
15 Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th
16 Cir. 1995), citing Federal Sav. & Loan Ins. Corp. v. Molinaro,
17 889 F.2d 899, 902 (9th Cir. 1989). However, "a court may decide
18 in its discretion to stay civil proceedings . . . 'when the
19 interests of justice seem[] to require such action.'" Keating,
20 45 F.3d at 324, citing SEC v. Dresser Industries, Inc., 628 F.2d
21 1368, 1375 (D.C. Cir. 1980). The determination is to be made
22 "'in light of the particular circumstances and competing
23 interests involved in the case.'" Keating, 45 F.3d at 324,
24 citing Molinaro, 889 F.2d at 902. The factors to be considered
25 include "the extent to which the defendant's fifth amendment
26 rights are implicated" and the following:

27 (1) the interest of the plaintiffs in proceeding
28 expeditiously with [the civil] litigation or any
particular aspect of it, and the potential prejudice to

1 plaintiffs of a delay; (2) the burden which any
2 particular aspect of the proceedings may impose on
3 defendants; (3) the convenience of the court in the
4 management of its cases, and the efficient use of
5 judicial resources; (4) the interests of persons not
6 parties to the civil litigation; and (5) the interest
7 of the public in the pending civil and criminal
8 litigation.

9 Keating, 45 F.3d at 324-25, citing Molinaro, 889 F.2d at 902-03.

10 Generally, the strongest case for a stay is made where the
11 civil and criminal cases involve the same subject matter.

12 Dresser Industries, 628 F.2d at 1375-76. In such situations,
13 "[t]he noncriminal proceeding, if not deferred, might undermine
14 the party's Fifth Amendment privilege against self-incrimination,
15 expand rights of criminal discovery beyond the limits of [federal
16 discovery rules], expose the basis of the defense to the
17 prosecution in advance of criminal trial, or otherwise prejudice
18 the case." Id. Thus, the court looks first to whether the civil
19 and criminal actions "spring from the same nucleus of facts" such
20 that resolution of the former will likely implicate many of the
21 factual issues in the latter. See Cont'l Ins. Co. v. Cota, 2008
22 U.S. Dist. LEXIS 111050, at *8-9 (N.D. Cal. 2008).

23 The court has reviewed the indictment and superseding
24 indictment against Salyer, the informations against other
25 individuals, and the plea and cooperation agreements filed as
26 exhibits. The court concludes that, with one minor exception,
27 the factual allegations in the adversary proceedings bear no
28 significant relationship to the allegations in the indictment. In
fact, in four of the adversary proceedings -- Nos. 09-2543 (the
drum line), 09-2692 (quiet title), 10-2016 (preferences and
fraudulent transfers), and 10-2017 (money loaned to the Fred

1 Salyer Irrevocable Trust), there is no factual commonality
2 whatsoever with the indictment against Salyer or the charges
3 against the other individuals.

4 The moving parties rely on the appearance of the term
5 "enterprise" in certain of the adversary complaints, contending
6 that that enterprise is the same one referenced in the
7 indictment. Even if it is, however, the premise of the
8 indictment is that the enterprise committed mail fraud, wire
9 fraud, and bribery with respect to the prices charged and quality
10 of product sold to its customers, whereas the adversary
11 complaints allege inter-company transfers among the Salyer
12 entities themselves, commingling of assets, common ownership,
13 management, and control, intermingling of business operations and
14 activities, and so on. The adversary complaints touch on the
15 issues of prices charged and product sold to customers only
16 peripherally, if at all. Similarly, the indictment does not
17 concern in any meaningful way the relationships among the Salyer
18 entities. Thus, the court finds that the allegations in the
19 indictment and those in the adversary proceedings are not
20 substantially similar, that similar evidence is not likely to be
21 presented in both to any great degree, and that any similarities
22 that do exist do not significantly implicate Salyer's Fifth
23 Amendment rights.

24 The moving parties contend they will need testimony of
25 Salyer and others involved in the criminal proceedings, including
26 Alan Huey and Steven King, in order to prepare their defenses.
27 However, in the examples cited, it appears the testimony needed
28 for the adversary proceedings will bear no relationship to the

1 allegations charged in the indictments and/or informations
2 against these individuals. For example, the complaint in Adv.
3 No. 09-2543 concerns the drum line, but there is no mention in
4 the indictment of the transactions or activities concerning the
5 drum line. Thus, although Salyer has invoked the Fifth Amendment
6 in that adversary proceeding, the court does not foresee any
7 testimony he might give, and the moving parties cite none, that
8 would legitimately be subject to Salyer's Fifth Amendment rights.
9 Similarly, there is no commonality whatsoever between the
10 criminal informations against Steven King and Alan Huey, on the
11 one hand, and the complaints in Adv. Nos. 09-2692 and 10-2017, in
12 which the moving parties expect them to testify, on the other
13 hand. Thus, the court would not reasonably expect either to have
14 any Fifth Amendment concerns about testifying in the adversary
15 proceedings.

16 As the trustee acknowledges, his complaint in Adv. No. 10-
17 2015 touches on the allegations of the indictment, but the
18 overwhelming majority of the allegations in the complaint are on
19 other subjects. To whatever limited extent there is an overlap,
20 there are alternatives to a stay that may be invoked to protect
21 Salyer's rights and the moving parties' ability to defend
22 themselves, including the right to invoke the Fifth Amendment on
23 a question by question basis, the right to seek protective
24 orders, and the parties' ability to provide discovery that does
25 not incriminate the criminal defendants. See O. Thronas v.
26 Blake, 2010 U.S. Dist. LEXIS 22101, at *8 (D. Haw. 2010). In any
27 event, the Fifth Amendment cannot be used as a blanket assertion
28 but only on a question by question basis. Garcia-Quintero v.

1 Gonzales, 455 F.3d 1006, 1019 (9th Cir. 2006), citing Doe ex rel.
2 Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1263 (9th Cir. 2000).)

3 In short, the court concludes that the adversary proceedings
4 do not significantly infringe on Salyer's or others' Fifth
5 Amendment rights, do not raise a meaningful risk of premature
6 disclosure of evidence, strategy, or defenses to the government,
7 and do not raise a risk that the trustee would gain an unfair
8 advantage by asking the court to draw adverse inferences based on
9 the assertion of Fifth Amendment rights.

10 A defendant has no absolute right not to be forced to
11 choose between testifying in a civil matter and
12 asserting his Fifth Amendment privilege. Not only is
13 it permissible to conduct a civil proceeding at the
14 same time as a related criminal proceeding, even if
that necessitates invocation of the Fifth Amendment
privilege, but it is even permissible for the trier of
fact to draw adverse inferences from the invocation of
the Fifth Amendment in a civil proceeding.

15 Keating, 45 F.3d at 326, citing Baxter v. Palmigiano, 425 U.S.
16 308, 318 (1976).

17 In light of the foregoing, it is probably unnecessary to
18 address the remaining Keating factors; however, the court will do
19 so in the interest of completeness. First, the interest of the
20 trustee and creditors in a speedy resolution of the adversary
21 proceedings is of prime importance in this case. The trustee has
22 sold the business operations of the debtor, and the adversary
23 proceedings represent the majority of the work remaining to be
24 done in the case, so that a stay of those proceedings would bring
25 the chapter 11 case, or alternatively, consummation of any
26 confirmed plan, to a virtual standstill, while the estate would
27 continue to incur substantial administrative expenses to the
28 detriment of creditors.

1 The presence of creditors in this case, who have filed 349
2 claims and who would be the ultimate beneficiaries of any
3 recovery in the adversary proceedings, distinguishes this case
4 from the others in which the district and state courts have
5 stayed proceedings involving Salyer. If the trustee is
6 successful in getting one or more of the defendant entities
7 substantively consolidated with the debtor, the interests of the
8 creditors of those entities will also be impacted.

9 There are numerous cases in which bankruptcy courts have
10 denied requests for a stay by defendants in adversary proceedings
11 who were also under criminal indictment. These courts emphasize
12 the interests of creditors and the public in the "efficient,
13 economical, and prompt administration of the bankruptcy estate,"
14 see Ries v. Paige (In re Paige), 2008 Bankr. LEXIS 816, at *6
15 (Bankr. N.D. Tex. 2008), and the resulting interest in the
16 expeditious resolution of adversary proceedings so the trustee
17 may make a prompt distribution to creditors. See Forman v.
18 Otlowski (In re NJ Affordable Homes Corp.), 2007 Bankr. LEXIS
19 1000, at *18, 19 (Bankr. N.J. 2007); Miranda v. Vidal (In re
20 Romany), 2006 Bankr. LEXIS 4273, at *10 (Bankr. D. Puerto Rico
21 2006); Carroll v. Unicom AP Chem. Corp. (In re MGL Corp.), 262
22 B.R. 324, 330 (Bankr. E.D. Pa. 2001); Kozyak v. Poindexter (In re
23 Financial Federated Title & Trust, Inc.), 252 B.R. 834, 839
24 (Bankr. S.D. Fla. 2000); Mendelsohn v. Gordon (In re Who's Who
25 Worldwide Registry), 197 B.R. 193, 197 (Bankr. E.D.N.Y. 1996).

26 The moving parties do not indicate when a trial in the
27 criminal case might be set; they do state, however, that the case
28 is complex and that the government has indicated it has well over

1 one million documents and nearly two hundred hours of tape
2 recordings. The indictment was filed only three months ago and a
3 superseding indictment was filed April 29, 2010, in which five
4 counts of price fixing were added. It is reasonable to conclude
5 that the trial will be months, quite possibly years, away. That
6 Salyer's preparation for such a complex trial may interfere with
7 his ability to assist in the defense of the adversary proceedings
8 weighs in favor of a stay to some extent, but the almost certain
9 long delay weighs heavily against. See Leyva v. Certified
10 Grocers of California, Ltd., 593 F.2d 857, 864 (9th Cir. 1979)
11 ["A stay should not be granted unless it appears likely the other
12 proceedings will be concluded within a reasonable time in
13 relation to the urgency of the claims presented to the court."];
14 O. Thronas v. Blake, 2010 U.S. Dist. LEXIS 22101, at *8 (D. Haw.
15 2010) [that the criminal case might not be resolved for years
16 weighed against imposition of a stay]; Ebay, Inc. v. Digital
17 Point Solutions, Inc., 2010 U.S. Dist. LEXIS 23253, at *17 (N.D.
18 Cal. 2010) ["The fact that the time line for a criminal action is
19 unclear strengthens eBay's argument that indefinite delay will
20 harm its financial interests, and that Defendants may use the
21 same funds that they allegedly obtained by fraud to support their
22 defense."].

23 The court agrees with the trustee that the longer the
24 adversary proceedings are delayed, the less likely it is the
25 trustee will be able to recover the assets he seeks. Obviously,
26 creditors would be severely prejudiced if assets available for
27 recovery were dissipated during the pendency of a stay. This was
28 a significant factor in Molinaro, in which the defendant was

1 attempting to dispose of his assets. Molinaro, 889 F.2d at 903.
2 The court considered that the plaintiff, the Federal Savings &
3 Loan Insurance Corporation, was acting in a representative
4 capacity on behalf of non-parties -- the depositors in the
5 defendant's savings and loan, whose interests would be prejudiced
6 by delay. Id. The defendant's "history of hiding and attempting
7 to dispose of his assets" was a prime factor in the court's
8 decision to deny a stay in FTC v. J.K. Publ'ns, Inc., 99 F. Supp.
9 2d 1176 (C.D. Cal. 2000), an action brought by the Federal Trade
10 Commission on behalf of thousands of defrauded credit card
11 holders and banks. 99 F. Supp. 2d at 1197.

12 In the present case, the court has already been sufficiently
13 persuaded of a similar risk of dissipation of assets to issue a
14 preliminary injunction against the defendants in the adversary
15 proceedings, who are the moving parties in this motion, from
16 transferring assets previously transferred to them by or through
17 the debtor. The moving parties now argue that the injunction
18 would protect the trustee and creditors from any risk of further
19 dissipation of assets during the pendency of a stay. The court
20 concludes to the contrary -- the findings and conclusions upon
21 which the injunction is based persuade the court that a real risk
22 continues to exist.

23 The court notes that the trustee, the unsecured creditors'
24 committee, and the Bank of Montreal, as agent for the secured
25 creditors, have now proposed a joint plan of liquidation, and
26 have set a hearing for consideration of their accompanying
27 disclosure statement for June 9, 2010. The compromises necessary
28 to enable a joint plan to be proposed are often fragile; it would

1 almost certainly be to the detriment of creditors if that process
2 were jeopardized by delays in the adversary proceedings.

3 Next, the interests of convenience to the court and the
4 efficient use of judicial resources do not favor the moving
5 parties. Because the court finds, as discussed above, a lack of
6 similarity between the adversary proceedings and the criminal
7 cases, the court rejects the suggestion that a stay "would help
8 to avoid duplicative judicial efforts," and might streamline
9 discovery in the adversary proceedings. A timely resolution of
10 the adversary proceedings is more likely to serve the interests
11 of the court in moving along the cases on its docket and the
12 efficient use of judicial resources.

13 Finally, the court considers whether the interests of the
14 public would be served by staying the adversary proceedings. The
15 court recognizes the public's interest in the integrity of
16 criminal cases, see Taylor, Bean & Whitaker Mortg. Corp. v.
17 Triduanum, 2009 U.S. Dist. LEXIS 60849, at *10 (E.D. Cal. 2009);
18 however, the government has not sought to intervene in this case
19 for the purpose of advancing that interest. See Bridgeport
20 Harbour Place I, LLC v. Ganim, 269 F. Supp. 2d 6 (D. Conn. 2002).
21 Further, that interest is far outweighed in this case by the
22 public's countervailing interests in 'ensuring that aggrieved
23 persons are made whole as rapidly as possible[,]'" see Ebay,
24 Inc., 2010 U.S. Dist. LEXIS 23253, at *18-19, and by the public's
25 interest in the prompt resolution of civil cases. See Melendres
26 v. Maricopa County, 2009 U.S. Dist. LEXIS 75364, at *16-17 (D.
27 Ariz. 2009).

28 III. CONCLUSION

1 A balancing of the interests of the moving parties, the
2 plaintiff, the creditors, the court, and the public in this case
3 leads to the conclusion that the adversary proceedings should not
4 be stayed.

5 For the reasons set forth above, the motion will be denied.
6 The court will issue an appropriate order.

7 Dated: June 1, 2010

8 
ROBERT S. BARDWIL
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I, Andrea Lovgren, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, mailed by ordinary mail a true copy of the attached document to each of the parties listed below:

Gregory Nuti
Kevin Coleman
Schnader Harrison Segal & Lewis
One Montgomery Street, Suite 2200
San Francisco, CA 94104- 5501

Jamie Dreher
Downey Brand, LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731

Donald Putterman
Kasowitz, Benson, Torres & Friedman
101 California Street, Suite 2050
San Francisco, CA 94111

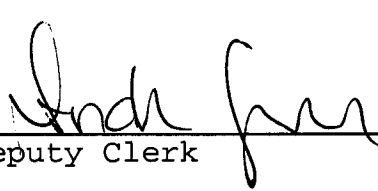
James Mayo
Segal & Kirby, LLP
770 L Street, 1440
Sacramento, CA 95814

Andrea Miller
Nageley Meredith & Miller
8001 Folsom Blvd., Suite 100
Sacramento, CA 95826

Paul Pascuzzi
Felderstein Fitzgerald
Willoughby & Pascuzzi
400 Capitol Mall, Suite 1450
Sacramento, CA 95814

Bank of Montreal
c/o James Spiotto
Chapman and Cutler
111 W Monroe Street
Chicago, IL 60603

DATE: June 1, 2010


Deputy Clerk